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No. 75-1090

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

KEITH B. REDD, d/b/a ABAJO PETROLEUM,
Petitioner,

vs.

SHELL OIL COMPANY,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The serious antitrust issues presented by the Petition for Certiorari involve the fundamental question of whether major oil companies by contract can explicitly control and restrict the source of supply and marketing territory of the independent businessmen through whom they market with impunity under the antitrust laws of the United States. The decision of the Tenth Circuit below holds they can and even sanctions a trademark infringement action to enforce such supply restrictions. Shell's opposition to the Petition attempts to falsely distort the factual and procedural posture of the questions presented for review and the direct conflicts between the decision below and th decisions of this Court and other circuit courts.

I.

Contrary to Shell the Tenth Circuit did not reverse the judgment for Redd on his claim of illegal territorial resale restriction on the ground the trial court had taken the issue of liability on that claim from the jury. Contrary to the repeated assertions by Shell (Shell Resp. at pp. 2, 6, 19, 20), plaintiff's antitrust claim of territorial resale restriction and all of the issues involved in that claim were decided by the jury and not the trial court (R. 1837-42, 1863-64).

The issue of whether Shell had violated the Sherman Act by restricting the territory in which Shell's branded jobbers could resell refined petroleum products purchased from Shell was presented in this action in two ways. The plaintiff asserted affirmatively a claim of territorial resale restriction against Shell and contrary to Shell that claim was asserted in the action below from its inception as the Tenth Circuit Court has already held *In re Graney* (*Redd v. Shell Oil Company*), 518 F.2d 311 (10th Cir. 1975). The plaintiff also raised as a defense to Shell's counterclaim for trademark infringement the defense of trademark misuse. As part of that defense the plaintiff claimed the explicit territorial resale restriction of Shell's jobber contract with Redd and other branded Shell jobbers (Plaintiff's Ex. 2, 14; R. 1080-83, 455) which precluded any such jobbers from competing with Shell in the sale of refined petroleum products to other branded Shell jobbers who were assigned separate territories by Shell constituted as a matter of law a misuse of Shell's trademark within Section 33(b)(7) of the Lanham Act, 15 U.S.C. § 1115(b)(7).

Redd moved for summary judgment on Shell's counterclaim on the ground Shell had misused its trademark both by its illegal tying arrangement and by its express effort to control the territory in which its jobbers could

resell products purchased from Shell. The trial court granted Redd summary judgment on Shell's counterclaim and sustained Redd's defense of trademark misuse on both grounds. The trial court's summary judgment on Shell's counterclaim, however, did not in any way affect the determination of plaintiff's affirmative claim against Shell for territorial resale restriction and the jury was never informed in any way of the court's ruling on the plaintiff's motion for summary judgment on Shell's counterclaim.

The plaintiff's affirmative claim of territorial resale restriction and all of the issues involved in that claim, including the question of whether Shell had violated Section 1 of the Sherman Act by combining and conspiring with its jobbers to restrict the territory in which they could resell refined petroleum products purchased from Shell were submitted to the jury (R. 1837-1842). The jury by its general verdict and by its answers to special interrogatories found Shell had engaged in such illegal territorial resale restrictions with its jobbers, that Shell f.o.b. bulk plant pricing and mandatory bulk plant delivery purchases were part and parcel of those restrictions, and that by reason of Shell's restrictive practices the plaintiff had been substantially damaged (R. 1863-64). The jury, not the court, resolved those factual issues against Shell.

The trial court did not instruct the jury that "firm and resolute" enforcement was an essential element of a territorial resale restriction violation. The Circuit reversed on the ground without such "firm and resolute" enforcement there was no anti-trust violation.

The requirement of "firm and resolute" enforcement as an essential element of a territorial resale restriction violation is directly contrary to *Schwinn* and the decisions of the Fifth and Ninth Circuits in *Copper Liquor, Inc. v.*

The Adolf Coors Co., 506 F.2d 934 (5th Cir. 1975), and *Noble v. McClatchy Newspapers*, ... F.2d .... 1975-2 Trade Cas. ¶ 60,594 (9th Cir. Nov. 14, 1975). Shell's effort to obfiscate the direct holding of the Circuit clearly confirms what Shell itself inadvertently recognized in its brief that the rule of *Schwinn* is in fact an "unequivocal prohibition against territorial restrictions" (Shell Resp. at p. 18). It is the Tenth Circuit's refusal to follow that "unequivocal" rule that petitioner urges as one of the main reasons for granting the writ.

II.

Shell materially misstates a number of propositions in an attempt to obscure its illegal tying arrangement with its branded jobbers and the impact of the Tenth Circuit decision below in permitting major oil companies, such as Shell, to totally control competition in supply to their branded jobbers and dealers through trademark licenses.

1. Redd, contrary to Shell, marketed on a Shell branded basis as both a wholesaler and retailer. He had standard Shell service stations at Blanding and Monticello, Utah and Many Farms, Arizona. Indeed, he leased his Monticello station from Shell. (R. 442-43, PX 27, Ex. 119, R. 1120.)

2. All of Redd's marketing facilities, his bulk plants, tank trucks and service stations, carried Shell's marketing identification. (R. 446-48, 1639-40). All of Redd's Shell stations looked just like any other Shell station. They were identified with Shell colors, had Shell decals on the pumps and had large illuminated signs with the Shell claim. (R. 446-48.)

The sole support for Shell's statement that Redd maintained his own marketing identity is a citation to invoices

of Mr. Redd's to his resale customers bearing the tradename of Abajo Petroleum. Regardless of how Redd invoiced his customers, once his marketing facilities bore Shell's marketing identification, as all Mr. Redd's marketing facilities did (R. 1639-40), Redd was required by Shell to purchase all of the refined petroleum products he marketed under such identification from Shell (R. 1065-67, 884).

3. Shell's licensing arrangement with Redd and other branded jobbers was not just a "typical sale" of a trademark product. It was an arrangement pursuant to which Shell totally controlled the supply of gasoline and other refined products marketed by such jobbers. The "FRANCHISE" provision of Shell's Standard Jobber Contract granted Redd and other Shell jobbers a license to market under Shell's marketing identification including Shell's trademark, brand names and color scheme (PX 2, Ex. 2, ¶6, R. 438; PX 14, Ex. 33, ¶6, R. 782). When Redd and other Shell jobbers raised the Shell flag, they were totally deprvied of any competitive opportunity to purchase gasoline and other refined petroleum products from any source other than Shell. If Shell can enter into such arrangements with impunity, other major oil companies can do the same thing, and trademark licensing then becomes a vehicle for the total suppression of competition in supply in the petroleum industry.

4. Redd, contrary to Shell, did not market cheap, non-Shell gasoline under the Shell brand. He did market gasoline under the Shell brand that he purchased from another Shell jobber, Hunt, who was assigned the marketing territory immediately north of Mr. Redd and who was terminated simultaneously with Mr. Redd.[1] The gas-

[1]Contrary to Shell, the jury, in an answer to a special interrogatory, found on the basis of substantial evidence, that Shell had terminated Redd as a Shell jobber pursuant to a violation of Section 1 of the Sherman Act (R. 1864), but did not award Redd damages for illegal termination because he secured another supplier.

oline Redd bought from Hunt was cheaper in price, as was Shell gasoline available from other sources, including Black, a Conoco jobber. (R. 513;; PX 24, Ex. 93, R. 1061-62; PX 25, Ex. 103, R. 1061-62; PX 32, Ex. 137, R. 1399.) The gasoline Redd bought from Hunt was not cheaper in quality. The gasoline was either Shell gasoline or, with regard to most of the product, was gasoline of a higher octane than Shell's gasoline. (R. 1517, 1519, 1523-24.)

Shell, moreover, conclusively conceded in its answers to interrogatories that it did not claim there was any difference between Shell gasoline and non-Shell gasoline. (PX 15, Ex. 37-38, R. 785-86.)[2]

5. Whether that trademark license is a separate item for tying purposes must be determined under the paramount policy of competition reflected in the antitrust laws and not the policy of the Lanham Act. *Siegel v. Chicken Delight*, 448 F.2d 43 (9th Cir. 1971) *cert. denied*, 405 U.S. 955 (1972); *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.*, 463 F.2d 1002 (5th Cir. 1972), *cert. denied*, 409 U.S. 1086 (1972). The legislative history of the Lanham Act, as this Court has held, makes that clear. *U.S. v. Timken Roller Bearing Co.*, 83 F.Supp. 284 at n. 2 (N.D. Ohio 1949), *aff'd Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593 (1951). Nothing, however, in the policy of the Lanham Act permits, let alone compels, a trademark owner to require its licensees to purchase all of the products marketed under the trademark license with which the mark is associated from the manufacturer. The Lanham Act established trademarks as representation of product quality rather than product source. McCarthy, *Trademark Franchising and Anti-trust: The Trouble with*

[2] "Shell does not make any claim in this case concerning any difference between the physical, chemical or other characteristics of Shell gasoline or any other gasoline delivered to plaintiff or third persons." (Shell Answer to Interrogatory No. 5(c); PX 15, Ex. 37-38, R. 785-86.)

Tie-ins, 58 CALIF. L. REV. 1085 (1970). Although that Act does not specifically provide for trademark licensing, the Act permits the use of trademarks by others so long as the registrant retains some "legitimate" control over quality. 15 U.S.C. § 1127; McCarthy, *supra*. Indeed, the modern method of franchise marketing is nothing more than a sophisticated use of the right of trademark licensing. The obligation of the trademark licensor to control quality, however, does not require that the licensee be compelled to purchase products associated with the mark exclusively from the mark's owner. *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp., supra; Siegel v. Chicken Delight, supra;* McCarthy, *supra*. Compulsory purchasing from the licensor may be the easiest way to maintain quality control, but the public's confidence in the quality of the product identified may be maintained by less restrictive means such as purchase by specification. *Standard Oil v. U.S.*, 337 U.S. 293 (1949).

The question of quality control, moreover, is not a question of whether a trademark license is separable for tying purposes. The question of quality control is a question of whether the tying arrangement is justified. *U.S. v. Jerrold Electronics Corp.*, 187 F.Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961); *Siegel v. Chicken Delight, supra;* McCarthy, *supra* at 1114-15. The fact that Shell itself purchased gasoline that it required its branded jobbers to purchase from Shell from non-Shell sources by specification conclusively negated any such justification for Shell's illegal tying arrangement. *Standard Oil v. U.S., supra*. Finally, Shell purchased gasoline that it required its jobbers to purchase from Shell, not by Shell's specification, but, contrary to Shell's brief, by the specification of Shell's supplier, American. That fact was uncontrovertedly established by the contracts between Shell and American (PX 16, Ex. 43, R. 788.)

III.

The critical question of whether Shell's marketing identification was separable for tying purposes from the gasoline and other refined petroleum products that Shell required its jobbers to purchase from Shell was not whether Shell marketed its marketing identification separately from such products but whether Shell marketed such products separately from its identification. The uncontroverted record was that Shell did so and did so in large quantities at substantially lower prices. The restrictions imposed by Shell on Shell's jobbers deprived them of the competitive opportunity that Shell enjoyed to purchase by specification and deprived Shell's jobbers and its jobbers' customers of the benefits of such competition — lower prices. The question is not whether some franchising arrangements are different from other franchising ararngements but whether trademark licensing without justification is to become an exception to the normal course of competitive distribution. The importance of that issue warrants the attention of this Court.

CONCLUSION

The Tenth Circuit's decision below sanctions illegal tying arrangements and territorial resale restrictions in conflict with the decisions of this Court and other circuits and in conflict with the fundamental policy of competition reflected in the antitrust laws of the United States. The Petition for Certiorari therefore should be granted.

Respectfully submitted,

By .....

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March 29, 1976

CERTIFICATE OF SERVICE

I, DOUGLAS J. PARRY, Attorney for Petitioner, Keith B. Redd, d/b/a Abajo Petroleum, do hereby certify that on this .... day of March, 1976, a copy of the foregoing **Reply to Brief in Opposition to Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit has been served on the following:**

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